Charge:

[1] Nicholas George Nash McInnis has pleaded guilty to a charge that on or about Friday, the 22nd day of September, 2017 at or near Charlottetown, Prince Edward Island he did unlawfully have in his possession for the purpose of trafficking, cannabis marihuana, a substance included in Schedule II of the **Controlled Drugs and Substances Act**, and did thereby commit an offence contrary to section 5(2) and 5(3)(a.1) of the said **Act.**

History of Proceedings:

[2] Nicholas McInnis' first appearance on this matter was November 15th, 2017 and the matter was adjourned to November 27th, 2017, at which time as there was no election, he entered a guilty plea to the charge. Defence counsel requested the preparation of a Gladue Report, and the matter was adjourned first to January 3rd, 2018 and then to January 16th, 2018, so that such a report could be prepared.

[3] On January 16th, 2018, Crown counsel and Defence counsel made submissions and jointly recommended a suspended sentence in this matter. Neither counsel had provided any case law to support that, or any other sentence. I had indicated that the joint recommendation was significantly out of line with recent cases of a similar nature, and the matter was then adjourned to February 6, 2018 to give counsel an opportunity to make further submissions to support their joint recommendation, as the Supreme Court of Canada has directed is the appropriate means of dealing with such a matter.

[4] On February 1, 2018, a joint brief and book of authorities was filed and both Crown and Defence counsel made further submissions orally on February 6th, 2018. The matter was further adjourned to February 20th, 2018 for sentencing. On that date, I advised counsel that I had reviewed the Gladue report, the joint brief and all of their submissions. From the information before me in this matter, I was unable to determine if their joint submission should be accepted, and in fact, from that information, I did not know how they could have reached the joint submission in the first place.

[5] At that time, I pointed out a number of areas where there was insufficient information, or no information at all, and for key periods of Nicholas McInnis' life. While the Gladue report indicated that he had spent the majority of the time from ages 12 to 17 in and out of foster homes, no information from Child and Family Services in Manitoba was provided. While the Agreed Statement of Facts indicated that Nicholas McInnis had a youth record that could be disclosed, no information from his youth worker was provided as to the issues that were addressed during that probation period, the services or resources provided to him, nor his successes nor challenges during that time. Mr. McInnis' mother was not contacted for the report. The Gladue report did not indicate when or how Mr. McInnis moved from Manitoba to P.E.I. and no information from the school was obtained, although I was advised, in response to the questions that I posed, that he had been a student at the school for the year previous to the offence.

[6] I indicated that before I could determine if the joint recommendation on sentence was an appropriate one that I could accept, I required a great deal more information about Mr. McInnis and his personal circumstances than I had at that date. Counsel indicated it would take time to obtain that information and the matter was then adjourned to March 26th, 2018 to fix a date for sentencing.

[7] On March 26th, 2018, Crown counsel advised that information from Manitoba had been obtained regarding Mr. McInnis' youth files and probation files. Defence counsel indicated that contact information for Mr. McInnis' mother had been obtained but she had not yet been spoken to. As Mr. McInnis is now over 18, his consent was required before his file with Child and Family Services could be accessed and that had not yet been addressed. The matter was adjourned to May 2nd, 2018 to give counsel time to obtain that information. Counsel were asked to file any information by April 27th, 2018, to give me an opportunity to consider that material. Nothing was filed by either counsel.

[8] On May 2nd, 2018, the matter was before the Court, at which time Crown counsel indicated that they had reviewed the materials that they had, that there was nothing that would be of benefit to the Court, there was nothing to file and there were no further submissions to be made, other than to reinforce the joint recommendation. Defence counsel advised that she had spoken to Mr. McInnis' mother, Brenda Dukat, and provided a summary of the information from that call. She indicated she had nothing to file and no other information was provided from any of the other sources that I had requested.

Facts:

[9] An Agreed Statement of Facts has been filed with the Court in this matter on December 6th, 2017. That statement provides as follows:

[10] Nicholas George Nash McInnis is 18 years of age, born February 7th, 1999. He is of First Nations descent. He recently moved from Brandon, Manitoba to Charlottetown, Prince Edward Island.

[11] On September 22nd, 2017, Cst. Johnson, the R.C.M.P. Officer based out of Charlottetown Rural High School, received information that Mr McInnis was in possession of cannabis marijuana. At approximately 8:40 a.m., the Vice Principal of Charlottetown Rural, Stephen Wynne, Cst. Johnson and Mr. McInnis attended at the school's resource office. Mr. Wynne spoke with Mr. McInnis regarding the information he obtained about Mr. McInnis being in possession of cannabis marijuana, and requested that he empty his pockets. Mr. McInnis emptied his pockets and exclaimed, "okay, I have drugs on me." Mr. McInnis presented a clear sandwich bag with numerous small bags of cannabis marijuana. Cst. Johnson then arrested Mr. McInnis for possession for the purposes of trafficking. Cst. Johnson took a statement from Mr. McInnis, wherein Mr. McInnis informed Cst. Johnson that he was selling cannabis marijuana to approximately half a dozen students.

[12] In a search incident to arrest, the following items were seized: cell phone; small weigh scale; black folding pocket knife; dime baggies; clear sandwich bag containing 13 smaller baggies, each

with one gram of cannabis marijuana; clear sandwich bag containing four smaller baggies, each with a half gram of cannabis marijuana; and $164 of Canadian currency.

[13] Mr. McInnis' occurrence record outlines 81 reported calls made to police between December, 2012 and August 2017. The vast majority of these calls were missing person calls. There are a few youth indiscretions. Mr. McInnis has an unrelated youth criminal record dated October, 2014.

[14] That Agreed Statement of Facts was signed by both Crown counsel and Defence counsel and filed with the Court in this matter.

[15] In addition, during the sentencing hearing, on January 16th, 2018, counsel confirmed that Mr. McInnis was a student at Charlottetown Rural High school at the time he committed the offence there. He has a Youth Court record, which can be disclosed. He was convicted in October 2014 of theft of a motor vehicle, possession of a weapon, damage to property and theft under $5000. He was placed on probation for two years for those offences.

Offender's circumstances - Gladue Report:

[16] Nicholas McInnis is a full status Cree. At his request, a Gladue report was prepared and filed with the court.

[17] A "Gladue" report takes its name from the Supreme Court of Canada case of **R. v. Gladue**, 1999 CanLII 679 (SCC) wherein the Court indicated that when sentencing an aboriginal offender, the Court should have information before it regarding the particular circumstances of that offender.

[18] Nicholas McInnis was eighteen and a half years of age at the time of the offence. He turned 19 on February 7th, of this year. His background and circumstances are set out in the Gladue report in general terms. I have already noted some of the gaps in the Gladue report, and those have not been addressed by counsel, despite my request that they do so.

[19] It is only in the last few years that individuals in this province have received some training in the preparation of Gladue reports. My comments with respect to the report prepared in this matter are made to assist those who prepare these reports in understanding the type of information that the Court requires in these cases in order to craft a sentence that respects the Gladue principles as set out by the Supreme Court of Canada. Similar to a pre-sentence report, a Gladue report is prepared by an person who is independent and does not work for the Crown nor for the defence. That is the inherent value of such a report for the Court, that independence and providing the information the Court needs to craft an appropriate sentence, whether the information is helpful to the offender or casts him in a poor light.

[20] In gathering background information in respect to an offender, the writer may often receive conflicting information or opinions. Those different opinions may, in and of themselves, be illuminating. In some cases, putting the opposite information to a source may result in a more accurate comment or input. For example, if one person says the offender has a significant alcohol

problem, and another says the offender rarely drinks, asking each of those sources why they would say that when the other person indicates something quite different may get a more accurate comment from each.

[21] One of the weaknesses in the Gladue report prepared in this matter, besides the lack of information from key sources, is that Nicholas McInnis' mother, Brenda Dutka was not interviewed for the Gladue report. Nicholas McInnis' aunt, Charlene McInnis was not well enough to be interviewed for the report, but she submitted a six page typed letter to the Gladue writer, that she asked be submitted as part of the report. While Ms McInnis' letter has a lot of information in it, it does not set out the source of her information as it seems she lives in P.E.I. presently and it is not clear whether she was living in Manitoba previously, and if her comments are based on first hand observations or if it is information provided to her, and if so, by whom.

[22] On May 2nd, 2018, I was given an oral summary of the conversation Nicholas McInnis' lawyer had with his mother, Brenda Dutka. As I have reviewed all of that information, there is a great deal of conflicting and contrary information provided by those sources, which cannot be reconciled at this stage. Some of that can be attributed to the indication from all sources that the separation and subsequent divorce of Mr. McInnis' parents was quite acrimonious and that they had very different parenting styles. Some of the contrary indications might have been resolved if the writer had been able to actually interview all sources, although I do understand that Charlene McInnis was not available due to illness.

[23] Nicholas McInnis was born in Winnipeg, Manitoba to two Cree parents. He was apprehended at birth by Manitoba Child and Family Services and placed in a foster home, until at seven months of age he was adopted by John and Brenda McInnis. Brenda (McInnis) Dutka was not interviewed for the Gladue report. Information has now been received from her, following Defence counsel's telephone call to her. According to Mr. McInnis in the Gladue report, his relationship with his mother is quite strained. There is no reason in the report for that.

[24] John McInnis is not aboriginal. The Gladue report indicated that Brenda McInnis claimed Metis status, but John McInnis disputed the validity of such a claim, indicating she had self-identified as Metis in order to adopt the children. The McInnis' had previously adopted a daughter, who was also Cree and two years older than Nicholas. Nicholas McInnis' mother, Brenda Dutka, advised Defence counsel that she is Northern Manitoba Cree. Charlene McInnis indicated Ms Dutka was part Cree.

[25] Nick McInnis does not know anything about his biological parents. His father, John McInnis indicated that they came from one of the reserves in northern Manitoba, but he did not know which one. He indicated that there were serious problems with alcohol and violence, such that all five of their children had been apprehended from them at birth. There was no indication in the report as to the source of his knowledge.

[26] Nick McInnis' father, John, was in the military for 27 years. In order to provide a stable home life for the children when they were young, he tried to avoid moving around the country, and was only deployed overseas near the end of his career.

[27] Unfortunately, Mr. McInnis' parents separated when he was seven years of age. It appears that he and his sister went back and forth between both parents' homes for a time. Eventually his sister stayed with his mother full time and he stayed with his father.

[28] Little information was provided in the report about Nick McInnis' mother, whether she worked outside the home or what involvement she had with him after the separation and divorce. From the information obtained by Ms Murphy from Ms Dutka, Ms Dutka advised that she has worked as a social worker, in a correctional facility and is currently employed assessing claims for workers' compensation cases. Charlene McInnis described Ms Dutka as being very smart, and that after being a stay at home mom, had taken a number of courses and worked outside the home in challenging positions.

[29] According to the information provided by Ms Dutka, Nicholas McInnis stayed with his father because there were no rules there. By contrast, Nicholas McInnis described his father as being very strict and John McInnis indicated that Ms Dutka had no rules for the children.

[30] According to the Gladue report, when Nicholas McInnis was 12, his behaviour in his father's home deteriorated, and according to his father, he was running away, setting fires in the home, and the police were at the door several times a week. At that time, Nicholas McInnis went to foster care, and apart from short periods back home, he was in and out of foster care for the next five years. In the Gladue report, Nicholas McInnis was quite forthcoming in acknowledging that his behaviour at times was not appropriate during that period of time and resulted in him losing what had been, at various points, positive placements.

[31] As noted earlier, no information was obtained from Manitoba Child and Family Services as to the issues or difficulties Mr. McInnis experienced, the services provided to him or the successes or challenges that he faced. Since I am now dealing with Mr. McInnis for his actions as an 18 year old, details on his life experiences during the preceding five years from his social worker, as an independent evaluator and source of information, would have been extremely relevant when evaluating his current offence.

[32] When Mr. McInnis was 13, his sister died tragically in a car accident. This had a great impact on Nicholas McInnis, as one would expect, as he was close to his sister, and unfortunately, felt he might have been able to prevent the accident if he had been living with his mother at the time. It appears that Mr. McInnis could benefit from grief counseling in this regard, as he has yet to deal with this loss.

[33] According to the Gladue report, John McInnis was born in P.E.I. and recently moved back to P.E.I. He acknowledged in the report that he does suffer from PTSD as a result of his military service. The Gladue report then states: *"Although the extent of this matter was not thoroughly explored in the interview, research indicated that a child whose parent suffers from PTSD is greatly affected by this."* References to the website of the United States Department of Veteran Affairs and the website of Veteran Affairs Canada as to the effects of PTSD on families and children are then set out in the Gladue report.

[34] What is missing in this report is what were the details of John McInnis' PTSD; when did it occur or when was it diagnosed; how, if at all, did it impact on his daily functioning; was it treated and when; and was that treatment seen as being effective, or did the treatment have its own consequences. That information would be beneficial in determining the actual impact on Nicholas McInnis and at what time in his growth and development.

[35] Nicholas McInnis indicated that he was 15 when he realized his father suffered from PTSD. He knew that something was wrong prior to that, as his father would be easily frustrated and needed to keep busy around the home. According to the report, Nicholas McInnis was in foster care for the majority of time from ages 12 to 17, with only short periods of time back in his father's home. The general information from the website needs to relate to the specifics of this case to be of any assistance and unfortunately, that underlying information was not obtained.

[36] Nicholas McInnis has no adult criminal record, but as noted, did have a youth record. In October, 2014 he was placed on probation for two years for theft of a motor vehicle, possession of a weapon, damage to property and theft under $5000.

[37] One of the reasons information from Mr. McInnis' youth worker would have been relevant would have been to see if these offences occurred on one date and were related, or if they occurred over a period of time and were consolidated for sentencing on all matters at one time. Even more relevant would have been the services and resources provided to Mr. McInnis while on probation, the issues addressed and his successes and challenges during that time, and whether any of that information could be of assistance in crafting an appropriate sentence in this case.

[38] Although Crown counsel indicated that a copy of the police and youth files had been obtained by March 29th, 2018, when in Court on May 2nd, 2018, Crown counsel indicated that there was nothing in those files that would be of assistance to the court and the Crown had nothing further to submit or file.

Principles of sentencing:

[39] The principles of sentencing are set out in sections 718 to 718.2 of the **Criminal Code of Canada**, as well in section 10 of the **Controlled Drugs and Substances Act**, and are as follows:

> *718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:*
> *(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;*
> *(b) to deter the offender and other persons from committing offences;*
> *(c) to separate offenders from society, where necessary;*
> *(d) to assist in rehabilitating offenders;*
> *(e) to provide reparations for harm done to victims or to the community; and*

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:
(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender,
(none of the aggravating factors listed in 718.2(a) apply in this case)
b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Controlled Drugs and Substances Act:
10 (1) Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.
(2) If a person is convicted of a designated substance offence for which the court is not required to impose a minimum punishment, the court imposing sentence on the person shall consider any relevant aggravating factors including that the person
(a) in relation to the commission of the offence,
(I) carried, used or threatened to use a weapon;
(ii) used or threatened to use violence,
(iii) trafficked in a substance included in Schedule I, II, III, IV or V, or possessed such a substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of 18 years, or
(iv) trafficked in a substance included in Schedule I, II, III, IV or V, or possessed such a substance for the purpose of trafficking, to a person under the age of 18 years;
(b) was previously convicted of a designated substance offence; or
(c) used the services of a person under the age of eighteen years to commit, or involved such a person in the commission of, the offence.

(3) If, under subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in paragraphs (2)(a) to (c), but decides not to sentence the person to imprisonment, the court shall give reasons for that decision.

[40] In their initial sentencing submissions, Crown and Defence counsel indicated that the principle that deals with aboriginal offenders, section 718.2(e) must be given precedence, with the others to "*take a back seat in this case*". It was only when counsel were asked to justify their joint recommendation that other principles of sentencing were addressed, but their emphasis remained that the main consideration in this matter was that Nicholas McInnis was an aboriginal offender and their joint recommendation was designed to address that principle.

[41] With respect, I do not believe that is a correct interpretation of the law. While some principles of sentencing may be more relevant in a particular case than in another, because of the nature of the offence or the circumstances of an offender, all must nonetheless be considered.

[42] In **R. v. Gladue**, 1999 CanLII 679 (SCC), Justices Cory and Iacobucci, writing for the Supreme Court of Canada, stated:

78 In describing the effect of s. 718.2(e) in this way, we do not mean to suggest that, as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to the principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation. It is unreasonable to assume that aboriginal peoples themselves do not believe in the importance of these latter goals, and even if they do not, that such goals must not predominate in appropriate cases. Clearly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.

...81 The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the Criminal Code and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.

> *...83 How then is the consideration of s. 718.2(e) to proceed in the daily functioning of the courts? The manner in which the sentencing judge will carry out his or her statutory duty may vary from case to case. In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence. Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived. Where there is no such waiver, it will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.*
>
> *84 However, even where counsel do not adduce this evidence, where for example the offender is unrepresented, it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person. Whether the offender resides in a rural area, on a reserve or in an urban centre the sentencing judge must be made aware of alternatives to incarceration that exist whether inside or outside the aboriginal community of the particular offender. The alternatives existing in metropolitan areas must, as a matter of course, also be explored. Clearly the presence of an aboriginal offender will require special attention in pre-sentence reports. Beyond the use of the pre-sentence report, the sentencing judge may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives.*

[43] Short of arranging to have witnesses flown in from Manitoba, I have sought what I consider to be relevant information about Mr. McInnis' background and circumstances, but without success. No reason has been provided by counsel as to why such information has not been provided as requested.

[44] Over the past three or four years, I have had occasion to sentence a number of individuals on drug charges, one might say far too many. The drugs involved have been Schedule I or II drugs for the most part, and in varying quantities.

[45] We had a targeted operation in the City of Charlottetown, where approximately 34 individuals were charged and the majority of those individuals were sentenced by myself. There were a number of drug offences in Kings County which I deal with as well during that time.

[46] In each and every case, the Crown has filed a brief and case law. On each occasion, Crown counsel has filed the cases **R**. v. **Burke**, 2008 PESCTD 11, **R**. v. **Cody** 2007 PESCAD 7 and **R.** v. **Perry** 2007 PESCCA 15, to emphasize that the P.E.I. Supreme Court and Court of Appeal have indicated that denunciation and deterrence are primary sentencing considerations when dealing with offenders who are trafficking or have possession of drugs for the purposes of trafficking.

[47] Those cases were not filed nor relied upon in this matter by either counsel. It was when I asked counsel about their reliance on those cases in dealing with other offenders that the Crown submitted that deterrence and denunciation should "*take a back seat*" in this case.

[48] In the cases of **R**. v. **Cody** 2007 PESCAD 7 and **R.** v. **Perry** 2007 PESCCA 15, the Court of Appeal of Prince Edward Island indicated that sentencing courts must give effect to general and specific deterrence when considering the appropriate sentence to impose on a drug trafficker.

[49] In the case of **R**. v. **Perry**, **supra**, Justice McQuaid stated at paragraph 15:

> *I agree with the comments of Rosenberg J.A. in R. v. C.N.H., [2002] O.J. No. 4918 (Ont. C.A.) at para. 31 when he observed that s.10 of the Controlled Drugs and Substances Act codifies the view that all aspects of the public interest, including the protection of the public, is served when an addicted trafficker is sentenced in a manner which contributes to his or her treatment and rehabilitation. I also agree with him when he goes on to conclude that the sentencing objective of rehabilitation has much less application when the offender is not an addicted trafficker but rather one who committed the crime for profit and personal gain. The fact an offender committed the crime for profit and not to obtain the resources to support an addiction to drugs is an aggravating factor in considering a fit sentence for an offence contrary to the Controlled Drugs and Substances Act. Also see: R. v. Ly, [2006] A.J. No. 216 (Alta. Q.B.) at para. 17.*

[50] In the Gladue Report, Mr. McInnis spoke of his drug and alcohol use which began at the age of 14. There is a quote from him at page 15 of the Gladue Report which says:

> *"alcohol has had a negative impact on, in my life. Just seeing liquor makes me want to drink it. I do it occasionally now but it's not a problem now. In the past I've gotten into trouble when I was drinking. When I was younger, I blacked out and I tried breaking into a garage. There's a trespassing charge for that and a drinking under the influence under age. I was about 16 at the time. I got into drugs when I was 14 and 15. Started smoking weed at 14 then when I was late 15 years old I tried Percocets and opiates. I started those because of peer pressure and I just kept doing it. Not doing them now, I quit on my own. I was pretty sick when I quit."*

[51] Then there is a reference in the Gladue Report to the circumstances of the offence and at page 16 of the Gladue Report it says:

> Nicholas shared his account of the day he was charged with trafficking drugs on school property and quoted him as saying:
>
> *"I always had a dream to be a big drug dealer but I've had that dream back in Manitoba ... I had a chance to there. Here in P.E.I., me and my buddy went in and pitched in some money and bought half an ounce and started selling it and getting more. I was doing it in school and that's what got me caught. I wasn't too smart about the drug dealing thing but it's probably the stupidest thing I've ever done, was to bring drugs into a school.*

That day I brought drugs to school all bagged up in dime bags. Had a knife on me and a scale. I was barely even on the property and the principal asked, like, can I talk to you. I didn't think anything of it and I just went. I didn't resist, I complied. I had done this for a week and a half on school grounds.

I tried to make a career of it for money, respect. I was using marijuana at the time. I'm not dealing anymore. I take responsibility for what I have done, I understand how it's wrong. The negative thing is the kids being high while going to school. It's a problem at the school and I was a part of that problem. If I could change anything I wouldn't have brought it to school."

[52] In submissions in respect of this matter, Crown counsel referred to that passage and indicated that that was a troubling aspect of this case. Mr. McInnis didn't say that he wished he hadn't been involved in trafficking. He wished that he hadn't brought the drugs to the school.

[53] Referring again to the case of **R.** v. **Gladue**, **supra**, at paragraph 93, the Court provided a summary of what was discussed in that decision:

93 Let us see if a general summary can be made of what has been discussed in these reasons.

1. Part XXIII of the Criminal Code codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.

2. Section 718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

3. Section 718.2(e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

4. Section 718.2(e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.

5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(e) is to alter the method of analysis

which sentencing judges must use in determining a fit sentence for aboriginal offenders.

6. Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:
A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

8. If there is no alternative to incarceration the length of the term must be carefully considered.

9. Section 718.2(e) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

10. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

11. Section 718.2(e) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

13. It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

[54] Section 5(3) of the **Controlled Drugs and Substances Act** provides:

5(3) Every person who contravenes subsection (1) or (2)
(a) subject to paragraph (a.1), if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life, and
(a.1) if the subject matter of the offence is a substance included in Schedule II in an amount that is not more than the amount set out for that substance in Schedule VII, is guilty of an indictable offence and liable to imprisonment for a term of not more than five years less a day;

[55] So that is the maximum penalty that is available for this offence.

[56] Referring again to the case of **R**. v. **Gladue**, **supra**, the Court stated at paragraph 80:

80 As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?

[57] More recently, the Supreme Court of Canada in the case of **R.** v. **Ipeelee**, 2012 SCC 13 (CanLII) has restated the principles from the **Gladue** case.

[73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in Wells where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's

conduct" (para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of R. v. Skani, 2002 ABQB 1097 (CanLII), 331 A.R. 50, after describing the background factors that lead to Mr... Skani coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se. As Cory and Iacobucci JJ. state in Gladue, at para. 69:

> *In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.*

[74] The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. ...

[75] Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. Gladue is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. Gladue affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.

[58] More recently, the Ontario Court of Appeal has looked at this matter in the case of **R.** v. **F.H.L.,** 2018 ONCA 83 (CanLII). In that case, Justice Epstein speaking on behalf of the majority had occasion to review a sentence in which there was a Gladue Report and consider whether or not that report had been relied upon appropriately. Justice Epstein stated:

> *[38] The law, reviewed above, is clear. In order to be relevant to sentencing, an offender's Aboriginal background need not be causally connected to the offence(s) for which a sentence is being imposed. In what circumstances, then, will an offender's Aboriginal background influence their ultimate sentence? The answer is "not so easily ascertained or articulated": R. v. Whitehead, 2016 SKCA 165 (CanLII), 344 C.C.C. (3d) 1, at para. 60. Clearly, the mere assertion of one's Aboriginal heritage is insufficient – s. 718.2(e) does not create a "race-based discount on sentencing": Ipeelee, at para. 75. Although Aboriginal offenders are not required to "draw a straight line" between their Aboriginal roots and the offences for which they are being sentenced, more is required "than the bare assertion of an offender's Aboriginal status": R. v. Monckton, 2017 ONCA 450 (CanLII), 349 C.C.C. (3d) 90, at para. 115.*
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> *[39] It is also insufficient for an Aboriginal offender to point to the systemic and background factors affecting Aboriginal people in Canadian society. While courts are obliged to take judicial notice of those factors, they do not "necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel": Ipeelee, at para. 60 (emphasis in original); R. v. Radcliffe, 2017 ONCA 176 (CanLII), 347 C.C.C. (3d) 3, leave to appeal refused, [2017] S.C.C.A. No. 274, at para. 54.*
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> *[40] The correct approach may be articulated as follows. For an offender's Aboriginal background to influence his or her ultimate sentence, the systemic and background factors affecting Aboriginal people in Canadian society must have impacted the offender's life in a way that (1) bears on moral blameworthiness, or (2) indicates which types of sentencing objectives should be prioritized in the offender's case. This approach finds support both in Ipeelee and decisions of this court.*
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> *[41] The Supreme Court made clear in Ipeelee, at para. 83, that systemic and background factors need to be "tied in some way to the particular offender and offence". LeBel J. went on to note that "[u]nless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence." LeBel J. elaborated on the concept of "culpability" at para. 73, explaining that "systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness."*
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> *[42] This court has followed LeBel J.'s guidance in multiple cases. In Kreko, Pardu J.A. explained at para. 23 that "the [systemic and background] factors must be tied to the particular offender and offence(s) in that they must bear on his or her culpability or indicate which types of sanctions may be appropriate in order to effectively achieve the objectives of sentencing". Watt J.A. reached a similar*

conclusion in Radcliffe, at para. 55: see also Monckton, at para. 116; R. v. Johnson, 2013 ONCA 177 (CanLII), 303 O.A.C. 111, at para. 64.

[43] From a sentencing judge's perspective, adhering to this approach requires attention to two factors.

[44] First, a sentencing judge must take judicial notice of the systemic and background factors affecting Aboriginal peoples in Canadian society. These factors include "such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples": Ipeelee, at para. 60. This list is not exhaustive.

[45] Second, a sentencing judge must consider whether those systemic and background factors "bear on the [offender's] culpability or indicate which types of sanctions may be appropriate in order to effectively achieve the objectives of sentencing": Kreko, at para. 23. This inquiry, by necessity, requires the sentencing judge to consider whether those factors have impacted the offender's own life experiences – in other words, whether the offender has "lift[ed] his life circumstances and Aboriginal status from the general to the specific": Monckton, at para. 117; R. v. Bauer, 2013 ONCA 691 (CanLII), 119 O.R. (3d) 16, at para. 13. If systemic and background factors have impacted an Aboriginal offender's own life experiences, the sentencing judge must then consider whether they "illuminate the offender's level of moral blameworthiness" or disclose the sentencing objectives that should be prioritized: Radcliffe, at para. 53; Kreko, at para. 23. The Supreme Court provided the following comments about moral blameworthiness in Ipeelee, at para. 73: ...

[59] I have already quoted the same paragraph from **Ipeelee, supra**, earlier in this decision, and so will not repeat it. Justice Epstein then continued:

[46] Sentencing judges must therefore be attentive to whether the circumstances of Aboriginal offenders – viewed in the light of the systemic and background factors described above – "diminish their moral culpability". In conducting this inquiry, however, courts must display sensitivity to the "devastating intergenerational effects of the collective experiences of Aboriginal peoples", which are often difficult to quantify: Ipeelee, at para. 82. When inquiring into "moral blameworthiness", courts must ensure they do not inadvertently reintroduce the same evidentiary difficulties that Ipeelee sought to remove: Kent Roach, "Blaming the Victim: Canadian Law, Causation and Residential Schools" (2014) 64 University of Toronto L.J. 566, at 588-593; Clayton Ruby, Gerald Chan, Nader R. Hasan, Annamaria Enenajor, Sentencing: Ninth Edition (Markham: LexisNexis Inc., 2017), at 712; R. v. Quinn, 2015 ABCA 250 (CanLII), 606 A.R. 233, at para. 49 (per Biebly J.A., dissenting). I find persuasive the following observation by the Saskatchewan Court of Appeal in Whitehead on the approach that sentencing judges should follow:

> *The link between systemic or background factors and moral culpability for an offence does not require a detailed chain of*

> *causative reasoning. Instead, the analysis is based on inferences drawn from the evidence based on the wisdom and experience of the sentencing judge … In applying this approach, sentencing courts must pay careful attention to the complex harms that colonisation and discrimination have inflicted on Aboriginal peoples.*
>
> *[47] Systemic and background factors, however, do not operate as an excuse or justification for an offence: Ipeelee, at para. 83. They are only relevant to assessing the "degree of responsibility of the offender", and to considering whether non-retributive sentencing objectives should be prioritized. Accordingly, Gladue and Ipeelee do not detract from the "fundamental principle" that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: Ipeelee at para. 73. What Gladue and Ipeelee recognize is that evaluating the degree of responsibility of an Aboriginal offender requires a "different method of analysis": Ipeelee, at para. 59. A different method of analysis does not necessarily mandate a different result: Kakekagamick, at para. 36. Crafting a just and appropriate sentence may, in some cases, require giving greater weight to sentencing objectives such as deterrence and denunciation: Gladue, at para. 78; R. v. Wells, 2000 SCC 10 (CanLII), [2000] 1 S.C.R. 207, at para. 44. As this court recognized in Kakekagamick, at para. 42:*
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> > *To be clear, s. 718.2(e) does not require, nor is there a general rule, that Aboriginal offenders must be sentenced in a way that gives the most weight to the principle of restorative justice. It may be that in certain cases the objectives of restorative justice articulated in s. 718.2(e) and Gladue will not weigh as favourably as those of separation, denunciation and deterrence.*

[60] Justice Epstein then went on to review the sentence that had been imposed on the offender in **R.F.L.**, **supra**, and concluded:

> *[49] First, the evidence does not demonstrate that the systemic and background factors affecting Aboriginal peoples in Canada have impacted the appellant in a way that bears on his moral blameworthiness. In this case, the pre-sentence report and the Gladue report do not show that the appellant's reported childhood difficulties or alcoholism were linked to systemic, background or intergenerational factors related to his Aboriginal heritage. Unlike in Kreko, there is no evidence that (1) such factors contributed to the appellant's experiencing dislocation or an identity crisis coinciding with his involvement in the criminal justice system, or that (2) such factors otherwise impacted the appellant's moral blameworthiness: see Bauer, at para. 14.*
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> *[50] Second, even assuming the Gladue factors carried greater weight in this case, the nature of the appellant's offence cries out for deterrence and denunciation.*

[61] We also have the benefit of the decision of our Prince Edward Island Court of Appeal in the case of **R.** v. **Legere** 2016 PECA 7 (CanLII). In that case, there was a Gladue Report prepared for the Court of Appeal. The accused had plead guilty to a charge of possession for the purpose of

trafficking. The Gladue Report indicated that the accused was a 44-year-old man who had suffered horrific emotional, physical and sexual abuse as a child, and had been struggling his entire life to cope with the fallout from his childhood. He was abused emotionally, physically and sexually by virtually every person in his life in whom his care was entrusted, his father, his mother, his step-mother, his paternal grandmother, the homes and hospitals into which child protection agencies had placed him. He was slowly reintegrating with his aboriginal community and traditions. He was building a house with his brother on Lennox Island and hoped to build one for himself in the future. He had a long criminal record including four counts as a young offender and 14 convictions as an adult.

[62] The Court of Appeal indicated that, given the circumstances into which he was born and the unspeakable conditions in which he grew up, it was hardly surprising that he had been before the courts so frequently. The only surprise was that he had not been before the courts for more serious offences, and society should be thankful that the anger which he understandably felt did not give expression to violent crime.

[63] Mr. Legere had a prior related record and there was a joint recommendation before the Court of Appeal for the time that he had already served on the original sentence, 79 days, which was the equivalent of a four month sentence when statutory remission time was considered.

[64] The Court of Appeal accepted that recommendation and indicated that it was within the range of sentencing for that type of offence. The drug in that case was marijuana as well, as it was possession for the purpose of trafficking marijuana. That accused was a 44-year-old and that offence was not at a school. Mr. Legere was also placed on probation for a period of time.

[65] At the time that counsel made their original sentencing submissions in this matter, no case law was provided. The first case that I asked counsel about was that of Alan Dane Godfrey, who was an individual that I had sentenced on June 10, 2016 on a charge of possession for the purpose of trafficking marijuana. Crown counsel indicated that case could be distinguished from this one because Mr. Godfrey was not aboriginal. That is correct, he was not.

[66] There was an Agreed Statement of Facts filed in the Godfrey case which indicated on December 3rd, 2015, the Bluefield High School youth counsellor contacted the R.C.M.P. regarding a male suspected of drug activity in the parking lot of the Bluefield High School. Police arrived on the scene. Cst. Cormier began speaking with Alan Dane Godfrey when the Principal approached the vehicle and told Cst. Cormier that there were three students in his office who had admitted to buying drugs from Mr. Godfrey. He was arrested in the parking lot for possession of marijuana for the purpose of trafficking.

[67] As a result of the search incident to arrest, the following were found: a small baggie with 0.5 grams of marijuana in Mr. Godfrey's pocket; six small baggies, each with two grams of marijuana together inside a sandwich baggie; ten small baggies each with one gram of marijuana together inside a sandwich baggie; a medium size bag containing 0.4 grams of marijuana; a sandwich bag containing $94.75 located with the other baggies containing drugs; 15 small baggies containing trace evidence of marijuana; four large size sandwich bags; a grinder found in the driver's side door

compartment next to approximately one gram of marijuana which was spilled and could not be weighed; one medium size bag containing 3.7 grams of marijuana; and one small baggie containing 0.3 grams of marijuana. In total, 27 grams of marijuana were seized during the search incident to arrest.

[68] The principal returned to the vehicle following the search incident to arrest and provided the R.C.M.P. with three small baggies of marijuana, two weighing one gram each, and one weighing two grams, which had been recovered from the students in his office.

[69] Mr. Godfrey provided a cautioned statement where he admitted to attending the school property for the purpose of selling drugs to students; to selling five grams of marijuana to the three students who attended at the principal's office; smoking marijuana two months prior; starting to sell one month prior; and selling marijuana to pay for his habit of smoking marijuana.

[70] A search of Mr. Godfrey's cell phone revealed that his girlfriend at the time was a 17 year old high school student who was involved in setting up the drug deals at the high school. She would text Mr. Godfrey the quantity of the drugs needed and how they were to be packaged. Mr. Godfrey would then attend at the school and he would complete the transactions.

[71] Mr. Godfrey was 19 years of age, he was not a student at either Bluefield High School or any other high school and he had absolutely no criminal record at the time.

[72] At Mr. Godfrey's sentencing, Crown counsel provided me with a case from the Yukon Territory Supreme Court, the decision of **R.** v. **Harper**, 2003 YKSC 30 (CanLII), a decision from Justice Vertes. In that case the accused had pleaded guilty to a charge of trafficking in marijuana, contrary to Section 5 of the **Controlled Drugs and Substances Act**. The guilty plea was entered shortly before the trial. The accused sold marijuana on several occasions to three different individuals, all of whom were 14 years of age or younger. She sold things called pin-joints, small marijuana cigarettes, and they were sold for $5 each or they were exchanged for items that the children brought to her. The place where she was doing the selling was close to a youth treatment centre, a residential home for troubled youth, and close to a playground. This was the most serious aspect of the case.

[73] The accused had a prior record for possession of a controlled substance for the purpose of trafficking which had been entered in 1998, so five years previously. The section of the **Controlled Drugs and Substances Act** which made it a specific aggravating factor, trafficking in or near school grounds or places frequented by persons under the age of 18 was a factor in respect of the matter. The accused apparently had a very difficult background and in that case, a sentence of 12 months imprisonment followed by a year of probation was imposed.

[74] In that case, Ms. Harper was an aboriginal offender and it doesn't appear as though many of the Gladue factors were otherwise addressed in that case, according to the information that the Judge had received.

[75] As I have said, I have had occasion to deal with far too many of these cases involving drugs in recent times. The sentences that have been imposed have ranged anywhere from short periods of time in custody to lengthy periods of time in custody, depending on the nature of the drug involved, the quantity of the drug, and whether or not the offender had a prior criminal record.

[76] One of those matters would be Stephen Charles Davis,(unreported) who on January 21, 2016 received six months in jail for a charge of possession of marijuana for the purpose of trafficking in Montague. There was also a charge of trafficking in marijuana, and a charge of damage to property. Police had received information regarding drug use and trafficking on Main Street in Montague and made a patrol and commenced surveillance. The police saw a transaction between a male who emerged from a residence on Main Street. They saw a second transaction and an individual advised they had bought $2.50 worth of weed from Steve Davis. Marijuana was found on that person and they gave a statement indicating that they had bought that.

[77] The police conducted a search of Mr. Davis' residence where he resided with his girlfriend and they found 12.71 grams of marijuana bud, small baggies, digital scale, some tablets, purple E425's, and a variety of pills. Mr. Davis provided police with a warned statement. He told them he had sold marijuana since he was 14; he sold an ounce of marijuana a week; makes $80 an ounce; he doesn't sell pills; he set up marijuana deals using his girl friend's cell phone. In his apartment was Dilaudid and methadone, but he did not have a prescription and he was a needle user. He had a recent prior unrelated record. These transactions were not near a high school.

[78] Back to Mr. Godfrey, I'm not sure if I mentioned it but Mr. Godfrey got 6 months in jail plus two years of probation. There were two aggravating factors in Mr. Godfrey's case, the fact that he was selling on school property , probably three, as he was not a student there, and he was using a person under the age of 18 in order to facilitate those sales.

[79] Jan Morgan Robert Wolvers was involved a similar matter, possession for the purpose of trafficking marijuana, involving 126 grams, contained in three bags. He also had 100 percocets. On March 1, 2017, he received 12 months in jail on the percocets, six months concurrent on the marijuana.

[80] In the case of Michael Lee Rogers, a 2012 case, the accused was 35, pleaded guilty to possession for the purpose of trafficking marijuana, oxycodone, hydromorphone and cocaine. He had no related record and received fifteen months in jail for each offence, concurrent.

[81] Christopher Douglas Pearce was sentenced February 6th, 2011 to fourteen months in jail for possession of 30 grams of cocaine for the purpose of trafficking, possession of six oxycodone pills, 3.3 grams of cannabis resin, 2.4 grams of cannabis marijuana. He had pleaded guilty, and had a prior related record.

[82] Christopher William Francis McTague was sentenced October 5th, 2015 to 12 months in jail for possession of 4.2 kilograms of cannabis marijuana, 275 grams of cannabis resin for the purpose of trafficking, as well as possession of 23 oxycodone pills. He was 20 and had no prior criminal record.

[83] Stephen John MacDonald in January 2016, received 16 months in jail for trafficking $600 of marijuana butter to a police agent. He had no prior record, and was found guilty after a trial.

[84] Those are just a few of the cases that have been before the Courts, both before me and other judges in this jurisdiction.

[85] In respect of this matter, in the joint brief that was filed by counsel there is a reference to the case of **R.** v. **James Sark**. Judge Lantz sentenced Mr. Sark, an aboriginal offender, first indicated to be 45 days conditional discharge but it was corrected to indicate it was a conditional sentence, followed by eighteen months probation for possession of the purposes of trafficking 82 grams of marijuana and two charges of breach of probation. There was a Gladue Report which highlighted Mr. Sark's unique historical factors. He plead guilty but his plea came on the morning of the trial. He was 21. He had an unrelated criminal record including assault with a weapon for which he had received 120 days in jail.

[86] The joint brief then indicated the following case law, while not involving aboriginal offenders, were examples of sentences for **C.D.S.A**. offences committed at a school, and indicated that the matter of Jonathan Caleb Cormier, unreported, June 8th, 2017, was diverted to Alternative Measures. Mr. Cormier, a young non-aboriginal person was found in possession of marijuana on school grounds. It was his second **C.D.S.A.** offence.

[87] With all due respect, a referral to Alternative Measures is **not** a criminal record. It is a out-of-court resolution of the matter, such that the person does not get a criminal record and would **not** be a sentencing precedent. In addition, it was a charge of simple possession under 4(1) of the **Controlled Drugs and Substances Act**, not possession for the purposes of trafficking.

[88] The other case that is referenced is that of Mr. Godfrey, June 10th, 2016, a non-aboriginal person who plead guilty to possession for the purpose of trafficking at Bluefield, the case I have already referred to.

[89] In this case we have a joint recommendation from counsel. Counsel have indicated that in order to give effect to Mr. McInnis' aboriginal heritage and ancestry, that the appropriate sentence is a suspended sentence with probation and conditions to carry out the recommendations in the Gladue Report.

[90] In the case of **R.** v. **Anthony Cook** 2016 SCC 43 (CanLII) Justice Moldaver, speaking on behalf of the Court, stated:

> *[54] Counsel should, of course, provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. As trial judges are obliged to depart only rarely from joint submissions, there is a "corollary obligation upon counsel" to ensure that they "amply justify their position on the facts of the case as presented in open court" (Martin Committee Report, at p. 329). Sentencing — including sentencing based on a joint submission — cannot be done in the dark. The Crown and the Defence must "provide the trial judge not only with the proposed sentence,*

but with a full description of the facts relevant to the offender and the offence", in order to give the judge "a proper basis upon which to determine whether [the joint submission] should be accepted" (DeSousa, at para. 15; see also Sinclair, at para. 14).

[55] This is not to say that counsel must inform the trial judge of "their negotiating positions or the substance of their discussions leading to the agreement" (R. v. Tkachuk, 2001 ABCA 243 (CanLII), 293 A.R. 171, at para. 34). But counsel must be able to inform the trial judge why the proposed sentence would not bring the administration of justice into disrepute or otherwise be contrary to the public interest. If they do not, they run the risk that the trial judge will reject the joint submission.

[56] There may, of course, be cases where it is not possible to put the main considerations underlying a joint submission on the public record because of safety or privacy concerns, or the risk of jeopardizing ongoing criminal investigations (see Martin Committee Report, at p. 317). In such cases, counsel must find alternative means of communicating these considerations to the trial judge in order to ensure that the judge is apprised of the relevant considerations and that a proper record is created for appeal purposes.

[57] A thorough justification of the joint submission also has an important public perception component. Unless counsel put the considerations underlying the joint submission on the record, "though justice may be done, it may not have the appearance of being done; the public may suspect, rightly or wrongly, that an impropriety has occurred" (C. C. Ruby, G. J. Chan and N. R. Hasan, Sentencing (8th ed. 2012), at p. 73).

[58] Fourth, if the trial judge is not satisfied with the sentence proposed by counsel, "fundamental fairness dictates that an opportunity be afforded to counsel to make further submissions in an attempt to address the . . . judge's concerns before the sentence is imposed" (G.W.C., at para. 26). The judge should notify counsel that he or she has concerns, and invite further submissions on those concerns, including the possibility of allowing the accused to withdraw his or her guilty plea, as the trial judge did in this case.

[59] Fifth, if the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea. The circumstances in which a plea may be withdrawn need not be settled here. However, by way of example, withdrawal may be permitted where counsel have made a fundamental error about the legality of the proposed joint submission, for example, where a conditional sentence has been proposed but is unavailable.

[60] Finally, trial judges who remain unsatisfied by counsel's submissions should provide clear and cogent reasons for departing from the joint submission.

These reasons will help explain to the parties why the proposed sentence was unacceptable, and may assist them in the resolution of future cases. Reasons will also facilitate appellate review.

[91] The Supreme Court of Canada in **R. v. Anthony Cook, supra**, certainly makes it quite clear as to the benefits of a joint submission. They often involve bargaining between counsel, particularly if there is a weak case, or particularly if it is a question of saving a vulnerable witness, or a young witness from having to come to court to testify, as there is a substantial saving by accepting a guilty plea, sometimes to a lesser offence, such that that person isn't required to testify.

[92] In some cases, the Crown's case has some frailties to it. There may be some questions about whether or not there are breaches of the **Charter** which may or may not be resolved in favour of the Crown if the trial is run. Both the Crown and Defence always take the risk if a trial proceeds that the witnesses may not bring forward the evidence that they anticipate, that the Crown may not get the conviction that they're seeking or the accused may not get the acquittal that he is seeking. Joint recommendations, as is clearly set out in **R. v. Anthony Cook, supra**, are valuable in a busy system, as in many jurisdictions there is a great deal of concern about delays of matters coming before the Court. It would appear from **Anthony Cook** that that is certainly one of the motivating reasons for the strong direction that Justice Moldaver is providing to courts across the country, as to why joint recommendations should usually be accepted.

[93] Certainly joint recommendations may well save a great deal of Court time and as noted, they should not be departed from lightly or easily, so that there is a great deal of confidence by counsel that when they make a submission that can be justified, that it should be, and will be, accepted.

[94] In this case, as I have said this before but I will say it again, there was no request for Mr. McInnis to withdraw his guilty plea. In fact, the submission from his counsel in respect of this matter was that on his first appearance, Mr. McInnis wanted to enter a guilty plea. It was only put off until the second appearance because of the need to get disclosure, to look at it, and to ensure he had proper advice before he entered that guilty plea.

[95] There is no suggestion in this case that the joint submission was made in order to ensure that vulnerable witnesses would not have to come before the Court and testify.

[96] There has been no suggestion that at any point in time in respect of this matter that this was a frail case and that there was any concern that if the trial was run, that there would not be a conviction.

[97] There was no suggestion that there were Charter issues or frail evidence or other hurdles to the admission of evidence in respect of this matter that would have justified the recommendation that was coming before the Court on a joint recommendation in this matter.

[98] The main, and I think it would be fair to say, sole basis for the joint recommendation in respect of this matter that has been advanced to me is that because Mr. McInnis is an aboriginal person, that section 718.2(e) of the Criminal Code requires that that principle of sentencing be

given precedence and priority, and that the other principles of sentencing "*take a back seat*" in respect of this matter.

[99] This matter has dragged on far longer than probably either Mr. McInnis nor I would like. There certainly are indications in the material that is before the Court that Mr. McInnis has found this waiting time to be one of anxiety, as I can truly anticipate it would be. He doesn't know what is going to happen to him in respect of this matter and I can certainly appreciate the difficulties that has caused for him.

[100] However, the law is quite clear that an opportunity to justify the joint recommendation, when it is out of line with sentencing precedents, needs to be provided and this matter has been adjourned several times in order for that information to be provided to the Court.

[101] I must determine if the joint recommendation is acceptable on the basis of the information that is before the Court at this time, and in doing so must consider all of the information that I have from submissions from counsel; from materials that have been filed; from the Gladue Report; and the information from Mr. McInnis' mother, which was a verbal report that was provided through Defence counsel. As noted in **R. v. Anthony Cook, supra**:

> *[55]...But counsel must be able to inform the trial Judge why the proposed sentence would not bring the administration of justice into disrepute or otherwise be contrary to the public interest. If they do not they run the risk that the trial judge will reject the joint submission.*

[102] In my view, in respect of this matter, we have an accused who is at a high school where he has been a student for over a year and where he is still a student at the time of the offence. He takes drugs to the school for the purpose of trafficking, and he is apprehended on the school grounds in possession of drugs, as is set out in the Agreed Statement of Facts filed in respect of this matter. We have an individual who has made the comments that Mr. McInnis made, with respect to wanting to be a drug dealer to have respect, and the comments that he has made about how it was a stupid thing to take them to the school, and that he shouldn't have taken them to the school.

[103] We have a decision in 2016 at a neighbouring school with an individual of a similar age who had no prior criminal record. While Mr. McInnis has no adult criminal record, he has a youth record which can be disclosed. When we have the case of Mr. Godfrey, who received six months in jail for possession for the purpose of trafficking in marijuana at Bluefield High School, for counsel to suggest that Mr. McInnis, who has possession of drugs for the purpose of trafficking in marijuana at Charlottetown Rural High School should receive a suspended sentence, in my view, on the information that is before me, that proposed sentence would be contrary to the public interest and it would bring the administration of justice into disrepute.

[104] Mr. McInnis' personal circumstances, as I have already referred to, were set out in the Gladue report and in the submissions of counsel. He was adopted at seven months of age. According to the information provided in the letter from his aunt, she indicated that he and his sister had every advantage, and were well provided for as young children.

[105] There is a comment in the joint brief that he was, and I want to get the comment right, there is a comment that he was deprived of his understanding of his culture. The indications in the Gladue report were that around the age of 14, Mr. McInnis was interested in knowing more about his aboriginal heritage. That heritage was never made a secret to him, as he was always told he was adopted. His aunt's comment was that the fact that he was aboriginal was never an issue as far as his family was concerned. What he was told with respect of finding out about the specifics of his heritage were that until he was 18, he could not access that information. There was a comment in the joint brief that he couldn't participate in any cultural activities and he was denied that opportunity. That is not what the Gladue report indicated at all. It was that he couldn't make any inquiries about his biological parents until he was 18 because of the laws in Manitoba.

[106] According to his aunt, Mr. McInnis was an excellent student; he was a budding artist; he was sensitive; he was a natural at piano; he was involved in a skills program at the age of ten in the school which led to a special seat at a summer program for exceptional students; and he had a bursary put towards that for later on, although whether it is still there or not is another issue.

[107] There is an indication in one of the reports that he was diagnosed with F.A.S.D. but we do not have any information from Child and Family Services in Manitoba as to the impact that had, and he indicated that he did not take any treatment for that and was not taking any medication for that.

[108] Mr. McInnis, in his early years, grew up in a home with two parents. His father was in the military, with his mother apparently originally a stay-at-home parent, who then became a social worker, evolved as a correctional officer at a correctional facility, with both parents holding important positions.

[109] There is no indication of any of the systemic factors that have, unfortunately, been far too prevalent in the lives of many aboriginal offenders, whether high unemployment, alcoholism, or violence in the home. In fact, it is noteworthy in the Gladue report that Mr. McInnis indicated that although his parents split up, that he never heard any arguments between his parents prior to their divorce. In fact, it would seem as though their splitting up was a bit of a mystery to him as to why that had occurred.

[110] It appears that Mr. McInnis was never subject to witnessing violence in the home. When we look at the comments from the Ontario Court of Appeal in **R. v. R.F.L., supra**, in applying **Ipeelee** and **Gladue**, and their direction to courts as to how an individual's background and circumstances should be looked at, it is clear that there does not have to be any direct connection. The question is whether or not there has been any effect on the moral blameworthiness or any impact in respect of that, as I have already noted in those passages I have quoted from Justice Epstein of the Ontario Court of Appeal.

[111] In this particular case, Mr. McInnis has had some significant difficulties in his life, with his separation of his parents at the age of seven, the subsequent loss of his sister, and his acting out at home and then in foster care. However, the information before this Court does not indicate that there is any reduction in his moral blameworthiness in respect of this offence of possessing drugs

at the school for the purpose of trafficking, because of his aboriginal heritage or that any of those factors have been an influence in that regard, to reduce his level of culpability in this matter.

[112] I reject the joint recommendation in this particular matter, as the proposed sentence would bring the administration of justice into disrepute and it would be contrary to the public interest.

[113] There would hardly be a day that goes by that we don't pick up a newspaper, turn on a radio or a television, and there isn't some information with respect to the proposed changes to the marijuana laws in this country. We have heard that for the last year or two, if not longer, but in particular for the last year or two, that the proposed legislation, (which we have yet to see in any detail, but the proposed change has certainly been discussed in great detail) has had two recurring themes regardless of the party, the politician or the level of government politician that has discussed the matter. That is that the proposed changes have two significant purposes and those purposes are to reduce the impact that organized crime has in this regard, and the second is to keep drugs out of the hands of children.

[114] There has been extensive debate about the age at which, if and when marijuana is legalized, as to how old an individual will need to be in order to be able to purchase it. That debate has centered on the various studies that have been referred to by all of those who are in decision making positions, as well as others in the community who are concerned about these matters, as to whether it should be 19, should be 21, or some other age, and relying on numerous medical studies that indicate the impact that marijuana has on the development of young people's brains. The debate indicates how much difficulty and how significant the impact of marihuana can be on the development of young people. It is a matter of great concern, it seems, from all levels of government and many of the citizens who have opinions expressed over the period of time that this matter has been publically debated, as to how best to keep marijuana out of the hands of children, the target group for Mr. McInnis' criminal activities in this case.

[115] The ***Controlled Drugs and Substances Act*** specifically provides, as an aggravating factor, possessing, or trafficking in drugs at a high school, or at any school, period, or in areas where people are under the age of 18.

[116] To suggest that an individual who wants to make money, wants the prestige and respect of being a drug dealer, although I did not know that they had such, but Mr. McInnis obviously perceived it to be so, and is out buying drugs, taking them to the school, having them packaged such that they can be provided easily to student customers and having done it a number of times, as this was not a one time occurrence, as it had happened previous to the arrest for a period of time that same school year, according to his own information, and I do not think that there would be very many people in the community who would think that such actions and such a risk to their children who are at school, should be dealt with by a suspended sentence and attendance at a healing circle as those are what counsel have recommended as the sanctions and sentence to be imposed in this matter.

[117] The principles of sentencing have already been referred to. Imposing a sentence that brings home to Mr. McInnis that his actions are not acceptable, they are not going to be tolerated, which

brings home not only to him as a young person, but to others who may be of a like mind, as this is now the second case where we have had people at schools actually apprehended with possession of drugs for the purpose of trafficking, so it is the specific deterrence aspect to Mr. McInnis but it is also general deterrence as a factor for consideration in this case.

[118] This conduct is not acceptable. The message is that if you are going to take drugs to schools and you are caught with them, you should anticipate that there will be sanctions and those sanctions will not likely be ones that you are going to like. They will not be a slap on the wrist. They will be ones that will be there to protect the public and in particular, protect young individuals.

[119] Parents don't send their kids to school and think that that is where they will be getting their drugs. You hope they are not getting them anywhere but you certainly hope that they are not going to be getting them while they are in school. The issue is not just that it will affect their ability to be in school and concentrate on their schoolwork, the information that is in the public realm is such that it can be taken judicial notice of, and it is whether or not it is going to affect the development of their brains and affect their future. That is what we are talking about when one is providing drugs to people under the age of 18.

[120] In my view, the appropriate sentence in this matter, considering all the principles of sentencing, considering the sentences that have been imposed on other individuals, considering Mr. McInnis' circumstances as an aboriginal offender in particular, and how they relate to his level of culpability in respect of this matter and his moral blameworthiness, although as I indicated previously, I don't believe that those circumstances reduce his level of moral culpability in this particular matter, and in my view, the appropriate sentence in a case of this nature would be a period of time in jail, between four to five months.

[121] Mr. McInnis, as I have already indicated, has been before the Court since November, 2017. The delays in this matter are not ones that he specifically has caused.

[122] During that period of time, Mr. McInnis has made some very positive changes in his life. He is very fortunate to have had direct support from his aunt, who has provided some information with respect to the type of other supports that he has been provided with. He has gone from a situation where he was kicked out of his home by his father, apparently as a result of this offence, where he spent some time, supposedly couch surfing, although we do not have a lot of details of that, to where he was able to obtain stable housing.

[123] Mr. McInnis has worked through the Mi'kmaq Confederacy and the various programs that they have there. He has only, since the time of the commission of the offence, made any efforts to find out anything about his aboriginal heritage. He has availed himself of a number of programs through the Mi'kmaq Confederacy and in particular, it is impressive that he has completed his grade 12. He worked with the program that they have there for a period of time in the fall, such that he'll be able to graduate from grade 12 this year. He did that in what would be fairly trying circumstances, with the pressure that he had on him with this charge hanging over his head. Since that time, he has availed himself of a further program that is offered there.

[124] Both Mr. McInnis and the various people that he has worked with at the Mi'kmaq Confederacy are to be commended on the efforts that they have made, to step into the breach and to provide some significant degree of stabilization for Mr. McInnis from what he was experiencing at the time that he committed this offence.

[125] According to his aunt, Ms McInnis, he was able to get a one bedroom apartment in a native housing complex. Mr. McInnis was able to work with the education specialist at Native Council. He has been enrolled in the Success Program, that has life skills training as well as a job skills placement. I have been advised that he has completed the classroom part. He now has employment that is to continue for another four weeks or so. There is a good possibility he is going to get some work at the end of that time. Besides those efforts that he has made, he has participated in some sweats, he has enrolled in a drumming group and he is starting to learn about his aboriginal heritage and culture which he had not been aware of nor been involved in prior to the commission of this offence.

[126] Mr. McInnis has many more hurdles to deal with but he has made, as I say, significant progress and I do believe that it is appropriate in this case to give recognition to that progress. The sentence that I believe that otherwise would be appropriate in this matter, as I indicated, would be four to five months in jail.

[127] At this point in time, in order to not only deal with the issues of deterrence and denunciation but to also ensure that the issues of rehabilitation are equally considered at this stage, is to impose a sentence, which I do impose in this matter, Mr. McInnis, of 90 days in jail. That is a sentence that will enable you to continue with your work and to serve that sentence on an intermittent basis on weekends, if you wish to do so.

[128] Defence: He would, Your Honour, preferably next weekend.

[129] COURT: So the sentence, Mr. McInnis, is that you will serve 90 days in jail on this charge. That sentence will be served on an intermittent basis on consecutive weekends. A weekend will consist of Friday at six p.m. to Monday morning at six a.m., Ms. Murphy? And does he have transportation?

[130] Defence: He'll make arrangements, Your Honour, he indicates and those times are fine as he finishes work at five p.m.

[131] COURT: So the sentence will be served on consecutive weekends, a weekend consisting of Friday at six p.m. to Monday morning at six a.m., and that will start next Friday, May 11th, 2018. At all times when you are not in custody, you will be on probation until the sentence has been served and following that, the probation will continue for a total of 18 months from today's date.

[132] The terms of the probation, sir, are:

1. You are to keep the peace and be of good behaviour;
2. appear before the Court when, and if required to do so;

3. immediately notify the Probation Officer if there's any change of your address, your place of employment, education or training.

[133] Those are the statutory conditions, and they remain in effect throughout the period of the probation.

[134] The following conditions are additional. They remain in effect unless you come back before the Court and the Court changes them.

4. You are to report to and be under the supervision of a probation officer and you are to report in person immediately after court today, or on Monday morning since they won't be there now, and then at such times and places as directed by the Probation Officer;

5. you are to undergo such assessment, counselling and treatment for the use of alcohol, drugs, mental health problems and or the behaviour which led to this offence as may be prescribed by your probation officer, in consultation with the appropriate mental health, medical or professional counsel, and that may include inpatient and residential programs, if so prescribed;

6. you are barred from the premises of Charlottetown Rural High School, including the parking lot, and any of those premises, unless you have the prior written consent of the probation officer to be at that property;

7. you are to refrain absolutely from having in your body any alcohol or any mind altering substances (other than medication taken as prescribed by a physician), for 72 hours prior to your attendance at the Provincial Correctional Centre to serve the intermittent sentence, as well as during the time that you are in the jail, and you are to provide urine samples to the administration of the Provincial Correctional Centre, if so directed;

8. you are to refrain from associating with persons and frequenting places that may from time to time, be prescribed to you by the probation officer. So that condition, sir, is wide enough so that if there are particular people who you are hanging out with or places that you should not be having any contact with, the probation officer will name them, and they will give that to you in writing and then that becomes part of your probation order.

9. With the assistance of your Probation Officer, you are to follow the recommendations set out at page 21 of the Gladue Report.

[135] Many of those things are things that your probation officer is going to require some assistance from the Native Council or the Mi'kmaq Confederacy in order to set up, but the probation officer will be the liaison with those individuals to make sure that those recommendations are carried out, since some of those recommendations are also for counselling and other things that are more directly related to by the Probation Officer. That will ensure that there is a connection between what you are doing at the Native Council and what you are doing with the probation officer, so there is not a missing piece and there is not a duplication of efforts either..

[136] Ordinarily, Mr. McInnis, I would include a condition with respect to community service work but given your personal circumstances, the fact that you are working and have the chance of having further employment, certainly it would appear that between the counselling that you are engaged in and that you will need to be engaged in, in the future, and your work, that should keep you fairly busy so I am not going to include that. Ordinarily community service work would be ordered so you could try and put something back into the community because of the harm done in this particular matter. Have I missed anything with respect to conditions?

[137] Defence: No, Your Honour.

[138] COURT: Will you explain to your client, Ms. Murphy, the terms of probation, what happens if Mr. McInnis breaks the conditions of his probation order, commits another offence while he is on probation, as well as the provisions to review the additional terms, if there's any change in his circumstances?

[138] Defence: I will.

[139] COURT: There has to be a $200 assessment for the Victims of Crime Fund, given the mandatory provisions. How much time does he need to pay that?

[140] Defence: One year, please.

[141] COURT: There'll be one year to pay the assessment. There'll be a Fine Order, sir, indicating if it is not paid within that time, you could be required to come back before the Court to show why you should not be found in default of payment. If you are found in default of payment, the current legislation provides that you could receive two further days in jail for non-payment of that account. If you'd come forward, sir, to the clerk's desk and sign the Fine Order that I have read over to you, please.

[142] COURT: There are two other orders I have to make in respect of this matter, a Prohibition Order pursuant to Section 109(2)(a) of the Criminal Code and a Forfeiture Order that has already been consented to by Mr. McInnis and both counsel. I have signed those orders and will provide copies of them to counsel.

[143] So Mr. McInnis, you made a big mistake. You have done some very positive things for the last six months and I want you to understand that I have recognized that, by giving you a sentence that, while it is not what you wanted, I am sure, is one that will enable you to keep on with the program that you are in.

[144] You have made some positive connections through the Native Council. You have your aunt who is a supporter of you and who has helped you get those things set up. It is time to work out your difficulties with your father and your mother. Whether you live with them or not is another issue but you should be able to be in a position where at least you speak to them and have some contact with them. They are your relatives, your family.

[145] It is time for you to start doing some more positive things. There are some mental health issues that you need to deal with, so you can move forward and build on the positive things you have done for the last six months.

[146] As I say, that is why I have not imposed as much time in jail in this case as I think would have otherwise been appropriate. It is because you have used the time awaiting your sentence very well. Not everyone does that and it is to your credit that you have done so. That is why I want to recognize that you have made some positive steps. There are still some more things that need to be worked on but you have got a good start on that, sir, and hopefully you will be able to continue with that, so that we do not ever see you back in this Court for any matters of this sort, or any sort, again. So, good luck to you. You may adjourn, Madam Clerk.

Dated at Charlottetown, Province of Prince Edward Island this 4th day of May, 2018.

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Judge Nancy K. Orr
Provincial Court of Prince Edward Island